87-1455

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

—v.—

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals may set aside the trial court's factual findings without applying the clearly erroneous standard of review to any of the findings?

2. Whether the court of appeals may reject and replace with its own findings the dispositive factual findings of the trial court establishing the contractual intentions and assumptions of the parties and the nature of the commercial reprocessing industry at the time of the contract negotiations?

3. Whether failure to perform a contractual duty may be excused as commercially impracticable when the parties allocated to the party seeking excuse the specific risk which affected performance?

RULE 28.1 LISTING

The parent company, subsidiaries and affiliates of Florida Power & Light Company, in alphabetical order, are:

AGRI + LAN, INC.
ALANDCO INC.
ALLIED CONSUMER SERVICES CORPORATION
ASSOCIATED BANCARD-HOLDERS TRAVEL SERVICE, INC.
ASSOCIATED BANCARD-HOLDERS, INC.
ASSOCIATED INSURANCE MARKETERS INTERNATIONAL, INC.
ASSOCIATION ADMINISTRATORS, INC.
BAY LOAN AND INVESTMENT BANK
BONDED COLLECTION CORPORATION
CASCADE LAND AND DEVELOPMENT COMPANY
CB MANAGEMENT, INC.
CBR COLLECTION SERVICES DIVISION, INC.
CBR INFORMATION GROUP, INC.
CCB MANAGEMENT OF TEXAS, INC.
CENTRAL CREDIT CLEARING BUREAU, INC.
COLONIAL CLAIM SERVICES, INC.
COLONIAL EXCHANGE, INC.
COLONIAL PENN ANNUITY & LIFE INSURANCE COMPANY
COLONIAL PENN CAPITAL HOLDINGS, INC.
COLONIAL PENN COMMUNITIES, INC.
COLONIAL PENN CORPORATION
COLONIAL PENN DEVELOPERS, INC.
COLONIAL PENN DISTRIBUTORS CORP.
COLONIAL PENN FRANKLIN INSURANCE COMPANY
COLONIAL PENN GROUP DATA CORP.
COLONIAL PENN GROUP, INC.
COLONIAL PENN HERITAGE INSURANCE COMPANY
COLONIAL PENN HOLDINGS, INC.
COLONIAL PENN INSURANCE COMPANY
COLONIAL PENN INVESTMENT ADVISORS CORP.
COLONIAL PENN LIFE INSURANCE COMPANY
COLONIAL PENN PROPERTIES, INC.
COLONIAL PENN SERVICES CORP.

COLONIAL PENN UNDERWRITERS, INC.
COLONIAL PENN WARRANTY SERVICES COMPANY
CPC AGENCY, INC.
CPI INVESTMENT, INC.
CREDIT BUREAU DATA SERVICE, INC.
CREDIT BUREAU OF ALASKA, INC.
CREDIT BUREAU OF GREATER ST. PETERSBURG, INC.
CREDIT BUREAU OF LACROSSE, INC.
CREDIT BUREAU OF ORANGE COUNTY, INC
CREDIT BUREAU OF SHASTA & TRINITY COUNTIES, INC.
CREDIT BUREAU REPORTS, INC.
CREDIT SERVICES INTERNATIONAL, INC.
DAMAR CORPORATION
ENVIROQUIP, INC.
ESI DOUBLE "C", INC.
ESI GEOTHERMAL II, INC.
ESI GEOTHERMAL, INC.
ESI KERN FRONT, INC.
ESI SIERRA, INC.
FPL ASIA, INC.
FPL ENERGY SERVICES INC
FPL ENERSYS, INC. (Subsidiary)
FPL GROUP CABLE INC.
FPL GROUP CAPITAL INC
FPL GROUP, INC. (Parent Company)
FPL HOLDINGS INC
FPL INVESTMENTS INC
FPL QUALTEC, INC.
FPL TAIWAN I, INC.
FPL TAIWAN II, INC.
FPL TAIWAN III, INC.
FPL TAIWAN IV, INC.
FPL TAIWAN V, INC.
FPL TAIWAN VI, INC.
GROUP ASSOCIATION PLANS, INC.
GROUP INSURANCE PLANS (NORTH CAROLINA), INC.
HAWTHORNE ADVERTISING, INC.
HYDRO RESOURCES, INC.

INTERNATIONAL CREDIT SERVICE, INC.
INTRAMERICA LIFE INSURANCE COMPANY
LAND RESOURCES INVESTMENT CO. (Subsidiary)
MICROFICHE PUBLISHERS, INC.
NAPOHIO AGENCY, INC.
NATIONAL ASSOCIATION PLANS, INC.
NEW YORK NATIONAL ASSOCIATION PLANS, INC
NORTH COAST CREDIT ASSOCIATION
PALMETTO INSURANCE COMPANY LIMITED
PALMS INSURANCE COMPANY, LIMITED
PGI ACQUISITION CORPORATION
PRAXIS GROUP, INC.
QTX, INC.
QUALTEC PROFESSIONAL SERVICES, INC.
QUALTEC TESTING SERVICES, INC.
QUALTEC TRAINING SERVICES, INC.
REAL ESTATE DATA, INC.
REDI REALTY SERVICES, INC.
SANBORN MAP COMPANY, INC.
SELECT MAIL OF AMERICA, INC.
SPECIAL ACCIDENT & HEALTH PLANS, INC
TELESAT CABLEVISION OF SOUTH FLORIDA, INC.
TELESAT CABLEVISION, INC.
THE CREDIT BUREAU OF SALINAS, INC.
UNITED HOME EQUITY SERVICES, INC.
WOMEN UNLIMITED, INC.

EXPLANATORY NOTE ON ANNOTATIONS

The following annotations have been used in this petition:

"MDL T. ____"—refers to a page in the transcript of the fuel supply portion of this case which was tried as a multidistrict action brought by thirteen utility companies, including Florida Power & Light Company, against Westinghouse Electric Corporation.

"T. ____"—refers to a page in the transcript of the separate spent fuel disposal proceedings.

"A. ____"—refers to a page in the joint appendix submitted to the United States Court of Appeals for the Fourth Circuit.

"FPL-MDL-____"—refers to exhibits admitted into evidence on behalf of Florida Power & Light Company during the multidistrict fuel supply portion of this case.

"FPL-SF-____"—refers to exhibits admitted into evidence on behalf of Florida Power & Light Company during the spent fuel disposal portion of this case.

"DX-SF-____"—refers to exhibits admitted into evidence on behalf of Westinghouse Electric Corporation during the spent fuel disposal portion of this case.

"D."—refers to a page in the deposition of a person whose name precedes the "D."

"D(1)."—refers to the first of two deposition transcripts when the witness was deposed more than once.

"D(2)."—refers to the second of two deposition transcripts when the witness was deposed more than once.

"____a"—refers to a page in the separate appendix accompanying this petition.

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4 R. Anderson, *Anderson on the Uniform Commercial Code*, § 2-615:8 (3d Ed. 1983) 20

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FLORIDA POWER & LIGHT COMPANY,

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—v.—

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Florida Power & Light Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, reported at 826 F.2d 239, is reprinted in the separate appendix hereto at 1a-80a. The order denying rehearing and rehearing in banc, which is not reported, is reprinted in the separate appendix at 165a-166a.

The district court opinion on liability, reported at 517 F.Supp. 440, is reprinted in the separate appendix at 81a-119a. The opinion of the district court on remedies, reported at 597

F.Supp. 1456, is reprinted in the separate appendix at 120a-162a.[1]

JURISDICTION

The judgment of which review by this Court is sought was entered on August 12, 1987. A timely petition for rehearing and suggestion for rehearing in banc was denied on November 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, RULE, AND UNIFORM ACT INVOLVED

U.S. Constitution, Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Federal Rules Of Civil Procedure

Rule 52(a)

"(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportu-

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1 The district court issued an initial opinion on remedies, which is not reported. On rehearing that opinion was replaced with the reported decision cited above.

nity of the trial court to judge of the credibility of the witnesses. . . ."

Uniform Commercial Code

Section 2-615

"Excuse by Failure of Presupposed Conditions

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. . . ."

STATEMENT OF THE CASE

1. ***Overview.*** In November of 1965, Westinghouse Electric Corporation (Westinghouse) contracted to sell to Florida Power & Light Company (FPL) two nuclear power supply systems for the generation of electrical power. In May of 1966, in a companion agreement, Westinghouse further agreed to provide long term fuel service[2] for the two units. FPL insisted upon a comprehensive, fully-integrated fuel service agreement. Thus, the fuel contract was a ten-year, fixed price contract obligating

2 "Fuel service" included actual purchase and shipment of uranium, chemical and physical processing and conversion of the uranium element, fabrication of the processed raw materials into complex fuel assemblies, delivery and insertion of the fuel assemblies into the nuclear units and removal and disposal of the spent fuel.

Westinghouse to be responsible for all steps necessary to provide fuel components to the plant and, following their use, to "remove and dispose [of the used components] . . . as Westinghouse sees fit."

On September 2, 1975, Westinghouse advised FPL that, contrary to its contractual obligation, it had "no plans for removing the spent fuel." Six days later, Westinghouse notified FPL and thirteen other utility purchasers of Westinghouse nuclear units that, contrary to its contractual obligations, it would not even be supplying the nuclear fuel for those units. The utilities sued.[3]

FPL's complaint included claims for both the failure to supply new fuel, which was common to all the utility companies, and the failure to remove the spent fuel, which was unique to FPL. The thirteen federal cases were consolidated before the Honorable Judge Robert R. Merhige, Jr., in the United States District Court for the Eastern District of Virginia. The non-jury action was tried in two phases—the multidistrict fuel supply phase and the spent fuel disposal phase.

The multidistrict fuel supply phase required 108 trial days, filled with dozens of witnesses, including nuclear industry experts, hundreds of hours of testimony and more than 8,000 trial exhibits. The resulting transcript is in excess of 20,000 pages.

Westinghouse and FPL relied upon these fuel supply proceedings as an essential foundation for resolution of the spent fuel disposal issue. The five-day spent fuel disposal proceedings added the testimony of dozens of witnesses and more than 600 trial exhibits to the court's factual record.

Westinghouse defended both phases by asserting excuse under a variety of theories, including commercial impracticability. It attributed its refusal to supply or to remove the fuel to unforeseen events beyond its control. With respect to the breach

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3 Jurisdiction in each of the thirteen federal district court cases was premised on 28 U.S.C. § 1332(a).

of its specific contractual obligation to FPL to remove and dispose of the spent fuel "as Westinghouse sees fit," Westinghouse contended that the unavailability of commercial reprocessing of nuclear fuel as a distinct means of disposal excused this contractual obligation.

The parties agreed on the applicable legal theories. They disagreed vigorously, pointedly and continuously on the material facts to which those theories applied. The expectations of the two companies in 1964-65 and the nature and commercial maturity of the nuclear fuel industry received particular testimonial emphasis.

The trial court analyzed the factual questions exhaustively and, in detailed opinions, applied its comprehensive findings to the legal standard for commercial impracticability. It found that Westinghouse, to achieve its commercial objectives, in an untested but severely competitive market, intentionally, and in conscious ignorance of the scope and nature of the risks, unqualifiedly assumed all responsibility for removal and disposal of the spent fuel. "If this is not assumption of risk, the Court confesses itself unable to discern what would be." (109a).

The trial court refused to excuse Westinghouse from its contractual obligations and required it to reimburse FPL for the cost of removing and disposing of the spent fuel.

On appeal, the Fourth Circuit ignored the trial court's yearlong effort and simply substituted new findings on the key issues. Based upon its *de novo* findings, the court of appeals excused Westinghouse on the grounds of commercial impracticability and, "equitably adjusted" the entire $83 million disposal cost to FPL.

2. 1965-1966:

a. ***The Contract Negotiations.*** These contracts represented FPL's cautious entry into the infant commercial nuclear industry. At the time of the negotiations, FPL owned no nuclear plants. There were none in the entire South. Although interested in this new technology, FPL would not commit to

nuclear plants unless the contracts guaranteed that the costs of the equipment and the fuel would be comparable to FPL's fossil plants.

Accordingly, FPL would not purchase a nuclear plant unless it could obtain, at the same time, a long-term, full-service fuel contract at a guaranteed, fixed price. It refused to accept any contractual responsibility for any component step in the provision of the fuel.[4] It refused to accept any contract terms which compelled FPL to rely on new or untested technology.[5] FPL purchased energy at a guaranteed price as the energy was generated in the plant. The vendor was to provide sufficient fuel to the plant to generate that energy and was to remove the fuel when its energy had been depleted.

Westinghouse was in a decidedly more vulnerable bargaining posture. Neither the nuclear industry itself, nor the Atomic Energy Commission (AEC) which regulated it, had concluded that nuclear plants could compete commercially with fossil plants. In fact, what government support was provided to the industry at the time was for the stated purpose of permitting a "more realistic comparison of commercial aspects of nuclear and conventional power."[6] Under these circumstances, sales were demonstrably weak and competition among vendors was keen.

Westinghouse, driven to secure FPL's "vote of confidence" for both Westinghouse and nuclear power, calculatedly and willingly met FPL's terms. Westinghouse understood that if its fuel offer was unacceptable it would not get the essential plant contract it so desired.[7] Consequently, Westinghouse specifically accepted responsibility for each component of fuel service and

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4 When Westinghouse offered to reduce its price if FPL would accept some responsibility for the fuel procurement and removal, FPL declined, and paid a higher price to insure the certainty it required. (T. 683, A. 484).

5 T. 631, A. 466; T. 697, A. 493; T. 1343, A. 617.

6 DX-SF-445, p. 18.

7 T. 656; T. 1333; T. 1340, A. 616; T. 1341-1342.

assured FPL that each would be provided.[8] Its full-service fuel contract guarantee was intended to eliminate all uncertainty and economic risk from FPL's fuel costs.[9]

Although reprocessing was proposed by Westinghouse in several different draft contracts, all references to reprocessing as the means of disposal of the spent fuel were purposefully and meticulously deleted from the final contract,[10] which specified that Westinghouse was required to:

> Remove the irradiated [spent] fuel from the Plant site and dispose of it as Westinghouse sees fit.[11]

According to the Westinghouse executive with ultimate responsibility for these negotiations, Westinghouse, by its agreement, underwrote the entire fuel cycle.[12] He ruefully acknowledged that Westinghouse would never again make an offer like it made to FPL, explaining, "I am not that stupid anymore," and that he has now learned not to assume responsibility for, and the risks of, "things I didn't have any control over."[13]

b. ***The Risks and Westinghouse's Evaluation of the Risks.*** Westinghouse confirmed at trial that it never made a serious study of the nuclear fuel cycle or the technical risks it was undertaking.[14] There were reasons for caution, if not pessimism, about the future of commercial reprocessing at the time.

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8 T. 560-561, A. 451-452; T. 1294-1295, A. 600-601.

9 T. 562-563, A. 453-454; T. 567, A. 455; T. 570, A. 457; T. 1329-1330; T. 1333; FPL-SF-7, A. 658; FPL-SF-45; FPL-SF-46.

10 T. 686, A. 486. Reprocessing was referenced in options A and B, options which Westinghouse knew FPL would not select. See also n.20, *infra*.

11 FPL-MDL-17, p. 33.

12 Rengel D. 1057. See also T. 1315-1316, A. 605-606.

13 T. 1327-1328, A. 608-609. See also T. 1334-1335, A. 612-613.

14 T. 1335, A. 613; Rengel D. 1076. See also FPL-SF-23, A. 662-666; FPL-SF-28.

First, there was no commercial reprocessing industry in existence.[15] The only commercial reprocessing plant ever to operate in the United States (Nuclear Fuel Services) opened after FPL and Westinghouse had reached agreement on all material elements of the final contract. It operated for one month before the fuel contract was actually executed.[16] It closed after a short operating life and has never re-opened.

Secondly, there were, and remain, significant technological roadblocks to successful commercial reprocessing.[17]

Finally, and perhaps most significantly, it was evident that the emerging commercial reprocessing industry would be, and would have to be, assiduously regulated.[18] In 1965 there was no private ownership of nuclear fuel. The transfer of these activities and responsibilities from the federal government to private industry had enormous regulatory and safety implications. These implications were compounded exponentially by the fact that essentially none of the contemplated commercial facilities had yet been designed, built, licensed, operated or inspected. As Westinghouse was guaranteeing FPL's fuel costs, the AEC explicitly advised Congress and the industry that under private ownership it would impose appropriate safeguards and controls over nuclear materials and facilities, whatever these safeguards

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15 T. 610; T. 687, A. 487; T. 812.

16 T. 610; T. 745; T. 820; T. 991.

17 When spent fuel is disassembled into component parts during reprocessing, it yields uranium nitrate, plutonium nitrate and radioactive waste. To achieve the economic objectives it sought from reprocessing, Westinghouse required that both the uranium and the plutonium be recovered and recycled into fuel. (T. 553, A. 444; T. 556; T. 692-693; T. 720). Plutonium, however, had never been reprocessed on a commercial basis and recycled plutonium had never been reinserted in a commercial reactor. (T. 553-554, A. 444-445; T. 556; T. 690-693). Moreover, the government policies in effect revealed no intention on the part of government to provide plutonium fabrication services. (T. 997-998, A. 562-563). *See also* 138a-139a.

18 *See* 134a-138a. See also DX-SF-445, pp. 17, 163; DX-SF-447, pp. 306-307.

and controls turned out to be.[19] The scope, terms and financial impact of these yet to be developed safeguards and controls were by definition unknown. (*See also* 154a-155a).

3. *1966-1975*:

a. ***Performance by Westinghouse.*** Westinghouse knew in 1966 that it would be obligated to remove spent fuel from FPL's plant commencing in 1975.[20] Five years after the contract was signed, Westinghouse signed a letter of intent with Allied General Nuclear Services (AGNS), to reprocess the FPL spent fuel. Because of delays caused by Westinghouse, these extended negotiations never resulted in a signed agreement.

By this time the one commercial reprocessing plant described above had closed its doors, never to operate again. A proposed General Electric reprocessing plant had encountered insurmountable technical problems and was abandoned. Nonetheless, Westinghouse took no other steps to meet its contractual obligations to FPL.

b. ***Westinghouse Defaults.*** In September, 1975, in response to a FPL inquiry, Westinghouse advised FPL that it "had no plans for removing the spent fuel." Westinghouse attributed its breach to the fact that the schedule for removing the

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19 DX-SF-445, pp. 17, 163. The government did adopt a policy in 1957 that, if private reprocessing was not available, the government would "make financial settlements for the materials" and reprocess them. However, this safety net of sorts always had a cost-related price tag associated with it. The government never agreed to underwrite the commercial nuclear industry or any element of the nuclear fuel cycle. DX-SF-219; DX-SF-445. *See also* 142a-146a.

20 Although FPL had approximately five and one-half years from the date of execution of the fuel contract to select one of three fuel purchase options, Westinghouse knew at the time of execution that FPL would only select the option that required Westinghouse to remove and dispose of the spent fuel "as Westinghouse sees fit." Gray D(1). 47; Kinsman D(1). 67; Rutledge D. 65; Gilliland D. 55; FPL-SF-2, A. 650-651; FPL-SF-3, A. 652-653; FPL-SF-5, A. 654-655; FPL-SF-11, A. 660-661.

spent fuel was "of course, dependent on the Allied General Services' reprocessing schedule." (*See also* 94a).

c. *FPL Covers.* Following Westinghouse's September notification, FPL re-racked its existing spent fuel storage pools to accommodate additional spent fuel. A second re-racking has since assured FPL of continuous operation of the plant for its full projected useful life.

FPL has entered into a contract with the Department of Energy (DOE) for the ultimate disposal of the Westinghouse fuel at issue here. The DOE fee is approximately $83 million.

4. *The District Court Decisions.* Following the 108 days of fuel supply proceedings and the additional five-day trial devoted to the liability aspect of FPL's spent fuel removal claims, Judge Merhige issued his spent fuel liability decision on June 25, 1981. (81a-119a). Addressing the fundamental, factual conflicts framed with precision by the voluminous evidence, the court explicitly resolved all material disputes:

a. "[T]here is nothing in the evidence to evince an intention that Westinghouse was to be absolved from its responsibility to remove the spent fuel in the event that reprocessing would not be available." One of the basic and mutual assumptions of the contract was that FPL would have "no involvement whatsoever with reprocessing, or with whatever alternate disposition Westinghouse might make of the spent fuel." (105a, 153a. See also 88a-89a, 108a).

b. At the time of the contract, the commercial nuclear industry was in its infancy and reprocessing, in particular, had not been demonstrated to be commercially feasible and was, "for all practical purposes, unavailable." (89a-90a, 104a-105a, 109a, 136a-139a).

c. At the time of the contract, Westinghouse was in a position to know of the uncertainties associated with commercial reprocessing but had performed essentially no meaningful evaluation of the potential risks and had undertaken its obligations based on "very little knowledge." It entered into the contract in a state of "conscious ignorance." (85a, 111a).

d. Westinghouse, needing the award of FPL's related plant contracts to achieve critical industry-wide objectives, had intentionally taken a "calculated risk" on the fuel contract. Westinghouse, in its eagerness to construct the nuclear plants, was "willing to accept risks which Florida [FPL] was not willing to take." (87a-90a).

Synthesizing its months of critical observation and examination, the court concluded emphatically:

> Knowing full well Florida's [FPL's] requirements, and knowing that reprocessing, not being available even then as a practical matter, was highly uncertain, Westinghouse agreed to a contract term which in plain, unequivocal, unqualified language, required it to remove the spent fuel from Florida's [FPL's] plants. If this is not assumption of risk, the Court confesses itself unable to discern what would be. . . . [A]ll of the evidence, including the history of the negotiations and the parties' interests and goals in entering into the contract, indicate that the unqualified promise made by Westinghouse to remove the spent fuel was precisely the bargained for performance. (109a) (emphasis of court omitted).

The parties were unable to agree on a remedy for the Westinghouse breach. Accordingly, the court addressed remedies on January 16, 1984. Citing *Hadley v. Baxendale*, 9 Exch. 341 (1854), the court excused Westinghouse from further performance. At the same time, the court did not modify or recede in any fashion from its essential earlier factual findings.

FPL sought reconsideration. The court concluded that its January 1984 decision was inconsistent in "significant regards" with the 1981 liability decision, resulting from "errors of law" in the 1984 decision. (121a). Judge Merhige reviewed again all of the evidence, reaffirmed his initial factual findings, and issued a final decision on remedies on November 8, 1984, requiring Westinghouse to reimburse FPL for the cost of removing and disposing of the spent fuel. (120a-162a). Westinghouse appealed.

5. ***The Fourth Circuit Decision.*** On August 12, 1987, the United States Court of Appeals for the Fourth Circuit issued a 103-page decision, excusing Westinghouse from its contractual obligation to remove and dispose of the spent fuel. (1a-80a). Without the benefit of first-hand impressions of witnesses or the critical insights that flow from the actual observation of trial testimony for the better part of one year, the circuit court replaced essentially all of the district court's findings with its own account of the FPL-Westinghouse relationship and the historical setting out of which it arose. In stark contrast to the findings of the trial court, with respect to the two fundamental factual issues the circuit court found:

a. "[I]t was a basic assumption of both parties—Florida [FPL] and Westinghouse—that the disposal of the spent fuel would be effected by reprocessing . . . [and] that neither party doubted that reprocessing would be both feasible and available when they executed the contract and when performance under the contract would become due." (64a) (*But cf.* district court opinions at: 101a, 105a-106a, 108a, 153a-154a).

b. Reprocessing "was a long-established successful process the construction and operation of which presented no known obstacles." (54a-55a) (See also 16a, 64a) (*But cf.* district court opinions at: 89a-90a, 104a, 105a, 109a, 139a, 154a).[21]

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21 Other examples of the circuit court's radical evidentiary excursions include:

1. The circuit court's assumption that the $83 million disposal burden it shifted to FPL would automatically be passed on by the Florida Public Service Commission to FPL's ratepayers. (78a-79a). There is no record basis for this presumption of regulatory action.

2. The circuit court's treatment of the plant contract and the supply and disposal parts of the fuel contract as three distinct, unrelated transactions for purposes of assessing the increased cost of performance to Westinghouse. (76a). In contrast, the district court and both parties uniformly recognized that the plant and fuel contracts were part of a single transaction and must be considered together. (148a-149a) (see also T. 676, A. 479; T. 1340, A. 616).

(footnote continued on next page)

In presuming to act as the finder of fact and obliterating the trial court's legitimate role, the circuit court did not acknowledge, let alone apply, the clearly erroneous standard mandated by Rule 52(a), Fed.R.Civ.P. Ironically, having improperly arrogated to itself the trial court's function, it failed to perform that function properly or completely, ignoring both the facts and the arguments relating to Westinghouse's assumption of the risks associated with the removal and disposal of the spent fuel. This had been a principal focal point at the trial, addressed by both parties and the court. It never appears in the trial conducted by the circuit court.

(footnote continued from previous page)

3. The circuit court's assumption that Westinghouse would have realized a substantial profit if reprocessing had been available. (74a-77a). The trial court found that there was no hard evidence to support Westinghouse's profit calculations, which Westinghouse conceded were nothing more than assumptions with no underlying operation history. (88a) (see also T. 536-538; T. 586; T. 603-621; T. 992-993, A. 557-558; T. 1296-1297; Rutledge D. 27).

4. The circuit court contention that Congress, in the Nuclear Waste Policy Act (NWPA), contemplated that the cost of spent fuel disposal should be borne exclusively by the ratepayers receiving nuclear-generated power. (27a). The district court recognized that the legislative history specifically reflected that the NWPA was not intended to alter contractual obligations of a party, such as Westinghouse, to a utility and its ratepayers. (124a-125a and Congressional Record Vol. 128 (1982), September 30, 1982, H8171).

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit Court of Appeals Persists in Ignoring the Clearly Erroneous Standard of Review.

This case represents a regrettable display of judicial anarchy and aggrandizement. It is harmful enough to the legal process that the Fourth Circuit overturned the lower court's fact findings and created its own facts regarding the FPL-Westinghouse relationship and the historical setting out of which it arose. And that it did so without applying the clearly erroneous standard and in spite of the undisputed fact that this case turned virtually exclusively on questions of fact.

The overwhelming significance of this case arises, however, from the fact that it was a Fourth Circuit decision involving an essentially identical usurpation that was the basis for one of this Court's paradigm decisions ratifying the scope and purpose of Rule 52(a), *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Indeed, two of the Fourth Circuit judges who issued the decision below sat on the Fourth Circuit's *Anderson* panel. That court refuses to yield to the directions or the authority of this Supreme Court. In this one disturbing decision the Fourth Circuit has emasculated the role of the trial court and defied the Supreme Court by ignoring both Rule 52(a) and *Anderson*. If this case is not reviewed, the Fourth Circuit will have undermined the logic, the purpose and the effectiveness of our three-tiered federal judicial process.

II. The Clearly Erroneous Standard of Review Must Be Reinforced.

This case is not an isolated incident. Dozens of certiorari petitions are filed each term in which this Court is urged to confine appellate courts to the boundaries of review established in Rule 52(a).[22] The directives of Rule 52(a) and *Anderson*, and even *Dennison Manufacturing Company v. Panduit Corp.*, 106

22 An illustrative list of petitions for certiorari filed during the Court's 1986 and 1987 terms requesting enforcement of and guidance with respect to Rule 52(a) is contained in the separate appendix at 167a-172a.

S.Ct. 1578 (1986)[23] and *Icicle Seafoods, Inc. v. Worthington*, 106 S.Ct. 1527 (1986),[24] have been insufficient to deter circuit courts from *de novo* trials when the circuit court is dissatisfied with the result below.

This case is, however, an isolated opportunity. Judicial order must be re-established. If, following *Anderson*, the Fourth Circuit may freely engage in precisely the kind of fact-finding excursion this Court sought to prevent in *Anderson*, then there is no *Anderson*. District court trials become, as here, monstrously expensive, exhausting, time-consuming preludes to sprawling, boundless appellate reviews. In addition to the Fourth Circuit's refusal to abide by *Anderson*, this case is ripe for consideration for significant reasons going to the heart of Rule 52(a):

First, the trial court decisions in this case turned upon pure questions of fact. Therefore, Rule 52(a) defines the absolute boundaries of appellate review: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the

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23 Indeed, in *Dennison*, without even requesting briefs on the merits, this Court vacated the appellate court judgment and remanded for further consideration in light of Rule 52(a), where, as here, the circuit court decision "did not mention Rule 52(a), did not explicitly apply the clearly-erroneous standard to any of the District Court's findings . . . and did not explain why, if it was of that view, Rule 52(a) had no applicability to this issue." 106 S.Ct. at 1579.

24 Chief Justice Rehnquist, speaking for the Court in *Icicle*, explicitly and succinctly delineated the parameters of the authority of the appellate court in reviewing fact findings:

> If the Court of Appeals believes that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. *But it should not simply have made factual findings on its own.*

106 S.Ct. at 1530. (emphasis added).

opportunity of the trial court to judge of the credibility of witnesses."

Secondly, the trial court decisions reflect a thoroughly-informed comprehension of the commercial relationships between FPL and Westinghouse, the contractual terms which captured those relationships, and the intent, motives, purposes, conduct and responsibilities of each party. The record is filled with instances of the trial judge's thoughtful, personal examination of pivotal witnesses, as they waded through lengthy contract drafts and tedious engineering reports. The trial judge insisted on having in his hands duplicate copies of exhibits which permitted him to accompany witnesses through their examinations of complex technical materials. He read along with counsel as thousands of pages of deposition transcripts became a part of the record. He was an active, inquisitive, dedicated, model trier of fact.

As noted, the two phases of this case consumed more than 113 lengthy trial days, consisting of hundreds of hours of often divergent testimony of both industry experts and negotiators, as well as volumes of documentary evidence, on complex and interrelated factual issues. The trial judge was called upon to weigh carefully and frequently the credibility of witnesses whose testimony gave him clear choices as to whom to believe. The court of appeals, without personal access to any of the witnesses, nonetheless attempted the same exercise. As aptly articulated by this Court in *United States v. Oregon State Medical Society*, 343 U.S. 326, 332 (1952):

> There is no case more appropriate for adherence to this rule [52(a)] than one in which the complaining party creates a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses.

A third factor making this case peculiarly suitable, and compelling, for review is that the scope and impact of the circuit court's radical reweighing of the evidence are so vivid and extreme. A prime example is the circuit court's treatment of the pivotal factual issue as to the state of the commercial reprocess-

ing industry at the time of the contract negotiations. The findings on this point provide the foundation for all subsequent findings regarding the foreseeability of the events which occurred, the assumptions of the parties, the allocations of the risks, and, ultimately, whether performance is commercially impracticable.

The district court found unequivocally that both the technological and economic feasibility of commercial reprocessing were uncertain and undemonstrated at the time of the negotiations (*See, e.g.*, 89a-90a, 104a-105a, 109a, 136a-139a). In stark contrast, the circuit court declared that, at the time of the contract, commercial reprocessing was "demonstrated," "practical and available" and that neither party doubted its feasibility. (20a, 64a) (*See also* 14a, 16a, 54a-55a).

The circuit court's account of the history of commercial reprocessing is particularly troubling for two reasons. First, the court neither references nor apparently relied upon the extensive trial record regarding the status of reprocessing in 1965 and 1966.[25] Rather, the circuit court created an entirely new factual history of reprocessing which cannot be derived from and is not supported by the record. Apparently, the court rewrote the history of commercial reprocessing by making an independent review of materials outside the record, as most of its references are to materials that were not cited by either party on appeal or in the trial court.

Secondly, the circuit court's account of the history of commercial reprocessing stands in dramatic contrast to other judicial accounts of the commercial reprocessing industry. Most recently, three months prior to the circuit court's decision, the Federal Claims Court described the commercial reprocessing industry as an enterprise which was "not only subject to regulation but was fledging, newly developing, and somewhat

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25 In view of the extraordinary length and complexity of the proceedings below, and in an effort to provide the circuit court with a digestible portion of this record on appeal, the parties carefully designated portions of the record for transmission to the circuit court. Even the substantially pared down transmitted record on appeal consisted of 47 volumes.

speculative, . . . and involving new and highly complex technology." *NL Industries, Inc. v. United States*, 12 Cl.Ct. 391, 400 (1987). Similarly, in an action initiated by *Westinghouse*, the Third Circuit found that for over two decades (since 1957) the federal government, together with private industry, have "been *exploring* the *commercial feasibility* of constructing and operating the facilities necessary to implement this [commercial reprocessing] conversion process" and of "employing the plutonium recovered from such fuel." *Westinghouse Electric Corporation v. United States Nuclear Regulatory Commission*, 598 F.2d 759, 762 & n.4 (3d Cir. 1979) (emphasis added).

Likewise, in a 1982 decision, Judge Edwards of the District of Columbia Circuit observed that "thus far no [commercial] reprocessing of spent nuclear fuel, except in small experimental amounts, has occurred." *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 685 F.2d 459, 502 (D.C. Cir. 1982) (J. Edwards, concurring and dissenting in part) *rev'd on other grounds*, 462 U.S. 87 (1983).

The Second Circuit has similarly recognized the undemonstrated nature of commercial reprocessing: "the federal government, in conjunction with private industry, has since 1957 *investigated the potential* of recycling spent fuel in order to produce a new source of nuclear energy." *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 539 F.2d 824, 830 (2d Cir. 1976) (emphasis added), *vacated on other grounds and remanded to consider mootness*, 434 U.S. 1030 (1978).

Thus, even assuming *arguendo* that there were two permissible views of the evidence, since the district court's findings regarding the state of the commercial reprocessing industry are in complete accord with those of every other judicial body and are well documented in the record, the trial court's account is certainly "plausible in light of the record viewed in its entirety." *Anderson v. Bessemer City*, 470 U.S. at 574. The court of appeal was therefore precluded from reversing those findings,

even if it was "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.*[26]

Finally, this is a compelling case for review because of the grave impact of the Fourth Circuit's decision on FPL. In excusing Westinghouse from its contractual obligation, the court shifted to FPL an $83 million disposal burden. This is an absurd result in light of the undisputed fact that FPL zealously negotiated the terms of its contract with Westinghouse specifically to protect FPL and its ratepayers from the risks and unknown costs of an undeveloped industry and Westinghouse, in order to get the plant contract, willingly undertook these precise risks in 1966.[27]

The Fourth Circuit's remarkable disregard for the teachings of this Court in *Anderson*, *Icicle* and *Dennison* cannot be permitted. The circuit court not only never acknowledged or applied the clearly erroneous standard to any of the trial court's findings, the court simply engaged in a fact finding expedition of its own.[28] As aptly admonished by the Court in *Anderson*:

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26 Additional illustrations of the Fourth Circuit's independent recasting of the evidence are noted *supra* at n.21.

27 In addition, there remains a number of pending federal court cases in which the development of the commercial reprocessing industry is at issue. The anomalous history created by the circuit court in this case will at least confuse, and may even adversely impact, those proceedings.

28 The appellate court may substitute its view of the facts for that of the trial court only in those limited instances where (i) the reviewing court upon review of the *entire record* is "left with the definite and firm conviction that a mistake has been committed," and (ii) the record permits only one resolution of the factual issues. *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). *See also Anderson v. Bessemer City*, 470 U.S. at 573. None of these prerequisite factors were present here. It appears that the circuit court never even reviewed the 47 volume transmitted record on appeal. Rather, the court looked outside the record to develop its independent finding. *See, e.g., supra* at 17. Further, those portions of the record which were reviewed, were not examined in light of the proper deferential standard. Finally, the underlying record facts do not permit only the resolution chosen by the circuit court. For example, as discussed *supra* at 16-18, the Fourth Circuit's account of the commercial reprocessing industry as a "demonstrated", "available" industry is plainly not the only, nor even a permissible, view of the facts.

> [T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. . . . [T]he trial on the merits should be " 'the main event' . . . rather than a 'tryout on the road.' " *Anderson*, 470 U.S. at 575 (citation omitted).

The Fourth Circuit's wholesale encroachment into the fact-finding domain of the district court turned the trial from the main event into a side show. Such subversion of the discipline of Rule 52(a) and the decisions of this Court by the Fourth Circuit cannot be tolerated or left unaddressed by the Court.

III. The Circuit Court's Impracticability Analysis Overlooks the Fundamental Concept of Risk Allocation.

The Fourth Circuit's analysis of the defense of impracticability is in direct and irreconcilable conflict with the vast body of common law, including case law of this Court, the Uniform Commercial Code, and the treatises on impracticability. These authorities uniformly recognize that an overriding, inextricable element of the impracticability defense is assumption or allocation of risk. Where, as here, the parties have allocated the risk which has affected performance, the defense of impossibility or commercial impracticability is defeated.[29] Evidence of alloca-

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29 *See Northern Pacific Railway Company v. American Trading Company*, 195 U.S. 439, 467 (1904) (where the promisor takes the risks of known and unknown obstacles in making the contract, he "ought to be held to it"); *Transatlantic Financing Corporation v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966) (in order to be excused under Section 2-615, Uniform Commercial Code, the risk of the unexpected occurrence must not have been allocated to the promisor); *Aluminum Company of America v. Essex Group, Inc.*, 499 F.Supp. 53, 70 (W.D. Pa. 1980) (the defense of commercial impracticability is qualified by the notion of risk assumption and allocation); Uniform Commercial Code § 2-615 and Official Comment 8. *See also* 6 A. Corbin, *Corbin on Contracts* §§ 1327-1328 (2d Ed. 1962); Restatement (Second) of Contracts § 261, comments a and c (1981); 18 S. Williston, *Williston on Contracts* § 1972A (3d Ed. 1978); 4 R. Anderson, *Anderson on the Uniform Commercial Code* § 2-615:8 (3d Ed. 1983).

tion of the risks by the parties is to be found by considering both the express terms of the contract and the circumstances surrounding the contracting.[30]

The circuit court decision is devoid of recognition or consideration of the element of allocation or assumption of risk. As a result, the opinion fails to examine the facts, revealed in both the terms of the contract and the circumstances surrounding the contract, reflecting that Westinghouse consciously and unqualifiedly assumed all risks associated with its contractual obligation to remove and dispose of the spent fuel "as Westinghouse sees fit."

The circuit court's misstatement and consequent misapplication of the law of commercial impracticability apparently results from its exclusive reliance on its earlier decision in *Opera Company of Boston, Inc. v. Wolf Trap Foundation for the Performing Arts*, 817 F.2d 1094 (4th Cir. 1987), to identify the elements of the defense of commercial impracticability. (49a). *Opera Company* recites the elements of the defense of impracticability (or impossibility) only for purposes of asserting a prima facie defense to a breach of contract claim.[31] Allocation of risk is, in essence, an affirmative defense to the defense of commercial impracticability. It was apparently never raised by the promisee in *Opera Company*. Consequently, the *Opera Company* court did not need to consider or discuss this issue. Risk allocation was, however, raised vigorously by FPL and considerable evidence was presented regarding the parties' efforts to allocate the risks associated with removal and disposal.

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30 Uniform Commercial Code § 2-615, Official Comment 8.

31 Thus, *Opera Company* only requires the party seeking to assert the defense of impossibility to establish "(1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its nonoccurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable." (49a, quoting from *Opera Company*, 817 F.2d at 1102).